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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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TRANS WORLD AIRLINES, INC., *Petitioner*,
v.
DELTA AIR LINES, INC., *et al.*, *Respondents*.
No. 679

EASTERN AIR LINES, INC., *Petitioner*,
v.
CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.
No. 777

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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## BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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April 8, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITIONS

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Delta Air Lines, Inc. (Delta), hereby opposes the petitions for a writ of certiorari of Trans World Airlines, Inc. (TWA), in No. 679[1] and of Eastern Air Lines, Inc. (Eastern), in No. 777.[2] These petitions

[1] References to TWA's petition will be indicated in parentheses by "TWA" followed by the page number, e.g. (TWA 7)

[2] References to Eastern's petition will be indicated in parentheses by "EAL" followed by the page number, e.g. (EAL 7)

are for a writ of certiorari to review the same judgment of the United States Court of Appeals for the District of Columbia Circuit.[3]

## COUNTERSTATEMENT OF THE CASE

The case below was based on petitions by Delta and others to review certain orders (J.A. 475, 479, 640) of the Civil Aeronautics Board (Board) in a proceeding known as the *St. Louis-Southeast Service Case* (*St. Louis Case*). In those orders the Board extended TWA's existing California-St. Louis route to Atlanta, Tampa, St. Petersburg and Miami and certificated Delta for a segment from Birmingham to Memphis.

The *St. Louis Case* was originally inaugurated in March 1956 to inquire into the need for service between St. Louis, on the one hand and Florida and other Southeastern points on the other. Despite several requests to expand the area of the case, particularly an attempt by Eastern to include a St. Louis-West Coast application and a Memphis-Kansas City application, the Board refused to expand the case, with the exception of including Memphis within the Southeastern area of the investigation.

At the same time the Board consolidated an application of TWA with respect to its existing Route 2 from the West Coast to St. Louis which sought an extension beyond St. Louis to Nashville, Atlanta, Tampa, St. Petersburg and Miami. Delta and others, including the Board's own Bureau of Air Operations, suggested that a restriction be imposed in the *St. Louis Case*

[3] Citations to the Opinion of the Court below will be to Appendix B to the petition in No. 679, e.g. (B7) References to material in the Joint Appendix will be by page number thereof, e.g. (J.A. 123)

which would prevent TWA from providing a through single-plane service from California to Georgia and Florida in the event TWA's application was granted. Although the Board refused so to restrict the issues *in advance of hearing*, it invited the parties to show a need for a more stringent limitation and clearly indicated its intention to conduct an "area" case and not a transcontinental case. Accordingly, under its application as then consolidated and in the absence of preimposed restriction, TWA could offer single-plane service between San Francisco, Oakland, Los Angeles, Las Vegas, Phoenix, Tucson, Albuquerque and Amarillo, on the one hand (points on TWA's existing Route 2), and Atlanta, Tampa, St. Petersburg and Miami, on the other (points to which TWA requested extension). This is graphically displayed on the map attached hereto as Appendix A.

At about the same time as the commencement of the *St. Louis Case*, the Board instituted a proceeding known as the *Dallas to the West Service Case* (*Dallas Case*) wherein it consolidated an application of Delta for an extension of its existing route system in the South and Southeast to the West from Dallas, via intermediate points, to Los Angeles, San Francisco and Oakland. Accordingly, under its application, Delta, because of its then existing certification to serve points in the Southeast and its proposal in the *Dallas Case* to be extended to Amarillo, Albuquerque, Tucson, Phoenix, Las Vegas, Los Angeles, Oakland and San Francisco, could offer single-plane service between identical pairs of points for which TWA proposed service in the *St. Louis Case* as shown in Appendix A hereto. In the case of TWA a mandatory stop would be required at St. Louis and in the case of Delta a mandatory stop at Dallas.

Both the *St. Louis Case* and the *Dallas Case* proceeded through hearing and initial decision and were briefed and argued to the Board. Subsequently, the *Dallas Case* including Delta's application therein was deferred and consolidated with the then recently inaugurated *Southern Transcontinental Service Case* because of exclusivity issues between the *Dallas Case* and California to Georgia/Florida applications in the *Southern Transcontinental Service Case*, as well as an exercise of administrative discretion (1) in order to retain full freedom to fashion a proper southern transcontinental route pattern and (2) as a matter of desirable procedure to consider all long-haul applications for East-West service in the southern States at the same time. (J.A. 789-90)

Promptly upon deferral of the *Dallas Case*, Delta moved that TWA's application in the *St. Louis Case* be deferred for contemporaneous and comparative consideration with the *Southern Transcontinental Service Case* and the deferred portion of the *Dallas Case*. The Board not only refused to defer TWA's application in the *St. Louis Case* but proceeded to grant it with the attendant right to and *for the reason that* TWA could provide transcontinental service from California to Georgia/Florida with a single required stop at St. Louis in competition with the interchanges hereinafter described.

For many years Delta and American Airlines, Inc. (American), had and even now continue to provide a single-plane interchange service operated by Delta between Atlanta and Dallas and by American from Dallas to California. Similarly, for many years Delta, American and National Airlines, Inc. (National), provided and continue to provide a single-plane inter-

change service operated by National from Florida points to New Orleans, by Delta from New Orleans to Dallas and by American between Dallas and California points. These interchanges were specifically approved by the Board as in the public interest.

Delta requested reconsideration of the Board's action in certificating TWA and pointed out that not only had the Board strictly limited the *St. Louis Case* to an "area" type proceeding but also that its refusal to defer TWA's application constituted a gross and reversible abuse of discretion, in view of the Board's deferral of Delta's application in the *Dallas Case* which would have allowed Delta to provide long-haul single-plane service between 32 identical major city pairs awarded to TWA—albeit with a required stop at Dallas rather than at St. Louis.[4] The Board refused to take affirmative action on Delta's petition for reconsideration.

In the same *St. Louis Case* Delta was certificated to offer service between Birmingham and Memphis, but was severely restricted in that any flight that originated or terminated either at St. Louis or Kansas City (on another of Delta's routes) and which also served a point in Florida, was required to serve Memphis *and* Birmingham *and* Atlanta as well. Eastern objected on the grounds that its Memphis-Kansas City application for a route wholly outside the area was excluded, but the Board found no exclusivity since Eastern's possible unlimited authority would be *so extensive* as compared to Delta's restricted multi-stop operation in limited markets as to avoid any question of exclusivity.

[4] See Appendix A hereto.

Delta petitioned the Court below to review the Orders of the Board which purported to award TWA its St. Louis-Southeast extension on the grounds that the Board had led the parties to believe that it was hearing only an area case but made a transcontinental award; that its refusal to defer consideration of the TWA award in view of its deferral of Delta's substantially similar application in the *Dallas Case* was a gross abuse of discretion; and that it had in fact granted the St. Louis-Southeast route to TWA *because* it could provide effective transcontinental service in competition with the interchanges.[5] Subsequently, American, Eastern and National, in that order, petitioned the Court below to review the same award. In addition, however, Eastern asked the Court to review the certification of Delta.

After briefs and argument, the Court below upheld Delta's, American's and National's contentions as to the TWA award; required additional findings by the Board as to one of Eastern's contentions concerning the TWA award but denied Eastern's remaining contentions thereto; and denied Eastern's contentions concerning the certification of Delta. No party saw any apparent need to request the Court below to clarify or explain its Opinion since no request for reconsideration was filed.

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[5] TWA itself estimated that it would be competitive with the interchanges. Not only did a TWA witness estimate under cross examination that TWA would obtain 50% of the Florida-California traffic but TWA's prepared exhibits so indicate with respect to Miami and Atlanta to Los Angeles and San Francisco. (J.A. 237-238)

## ARGUMENT

Both TWA and Eastern attempt to twist and distort the plain language of the Court below to create the impression—if possible—of conflict of decision in support of their respective petitions herein. The opinion, however, is a clear and logical application of the *Ashbacker* doctrine[6] to aviation route cases, as well as being dispositive of other matters and argument.

The Court below discussed the case before it in four major divisions. (B3) The argument herein will be directed to those same divisions since the contentions of TWA and Eastern can thus be most easily discussed.

### I. "The Mutual Exclusivity Contentions Advanced by American, Delta and National"

The Court below pointed out that the *St. Louis Case* was designed as an "area" type case to consider the need for service "between St. Louis on the one hand and Florida and other Southeastern points on the other." (B3) Upon consideration of various preliminary motions, some to expand the case to include service to the West Coast from St. Louis and some to impose limitations to prevent a St. Louis-Florida award "from being in effect a through service Florida-California via St. Louis," the Board "limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points." (B4-B5) The Court agreed that the Board cannot be compelled to expand an area case[7] but it also said that the Board

[6] So called and derived from the mutual exclusivity doctrine recited by this Court in *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327, (1945).

[7] In this respect the Court reaffirmed prior decisions in which it upheld the right of the Board to exercise sound discretion in limit-

"cannot hear an area case and, without more make a transcontinental award." (B10) The Court earlier recognized that the Board *had* made a transcontinental award to TWA as reflected in the Board's own opinions and orders.[8]

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ing areas to be considered in route cases." The Court said specifically:

> "It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[8] We now iterate the doctrine there stated: the Board must have a considerable measure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine."

> "[8] 100 U.S. App. D.C. 184, 243 F. 2d 607 (1956), cited and quoted in Eastern Air Lines v. Civil Aeronautics Board, 101 U.S. App. D.C. 156, 247 F. 2d 562 (1957)." (B7)

[8] "The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, 'operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta-American Interchange, and bring important service benefits to a respectable portion of the passengers moving in these markets.' And in its ruling on a motion for reconsideration the Board said:

> 'The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these "beyond area" benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity.'" (B5-B6)

The question then presented was, as stated by the Court:

> "* * * whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer." (B10)

The Court concluded that a *prima facie* showing of mutual exclusivity *had* been made[9] and that accord-

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[9] TWA attacks the Court's conclusion that a *prima facie* showing was made that an award to it of a California-Georgia/Florida route via St. Louis would make it an *effective competitor* in an *inadequate market*.

First, TWA says that its route via St. Louis is not a southern transcontinental route because "St. Louis is about 400 miles north of the upper limit of this southern transcontinental area." (TWA 9) The fact of the matter is that TWA's route via St. Louis is, for example, only 23 miles longer between Atlanta and San Francisco than Delta's proposed route via Dallas as prosecuted in its *Dallas Case* application which was consolidated into the *Southern Transcontinental Case* as well as the most expeditious routing under the present Delta-American interchange. This mileage differential at present jet aircraft speeds results in a time differential of something less than 3 minutes of flight. Applicable mileage and percentage differentials were called to the Board's attention in Delta's original motion to defer consideration of TWA's application (J.A. 434). Indeed the Board itself minimized the circuity involved in demonstrating that the through southern transcontinental traffic from California to southeast points will be conveniencied by TWA's "Florida-West Coast flights via St. Louis." (J.A. 494) Furthermore, TWA has held itself out to the public as providing *direct, fastest, only one-stop* and *only one-airline* service California to Florida (J.A. 635-638).

Next, TWA argues that "actual facts" demonstrate the markets to be adequate and cites traffic figures for that proposition. (TWA 16)

ingly the case must be remanded to the Board.[10]

Breaking down the 1958 figures to show the average number of passengers per day moving in each direction (i.e. to or from the California cities) there are only 65 passengers between Los Angeles and *all* the named Southeastern cities and a mere 33 passengers between San Francisco and *all* the named Southeastern cities. Taking the largest market alone, (Los Angeles-Miami) there are less than 40 passengers per day each way. The foregoing average daily available passengers should be viewed in light of the fact that present day transcontinental jet aircraft carry 115 or more passengers. Similarly, TWA argues from matters not of record in this case as to the effect of TWA's route via St. Louis on routes directly at issue in the *Southern Transcontinental Service Case*. It would be inappropriate herein to engage in an extended discussion of TWA's allegations since the matters must be considered in context. Nevertheless, this Honorable Court's attention is specifically called to the following testimony of TWA's own witness Cocke, in the *Southern Transcontinental Service Case*, which testimony appears at Transcript pages 11155-56 therein:

> "The Witness: Mr. Gray, I think I would have to say that in my opinion we should oppose an Atlanta-San Francisco carrier.
>
> "By Mr. Gray:
>
> "Q. Why do you oppose an Atlanta-San Francisco carrier and not oppose an Atlanta-Los Angeles carrier?
>
> "A. Only on the basis that I believe Los Angeles generally—if I remember the figures—at least twice as big in traffic as San Francisco. But I am not familiar with the traffic. You are asking my opinion. I am trying to give it to you.
>
> "Q. I want to know the basis as to why you oppose one and not the other. So it is your position that there is not sufficient traffic between Atlanta and San Francisco to allow the certification of Delta in addition to TWA's present operation through St. Louis?
>
> "A. That's right."

Clearly, TWA's attacks on the Court below that a *prima facie* showing of exclusivity are without merit.

[10]The Court did not attempt to dictate the action which the Board should take upon remand but suggested as possible alternatives either a hearing on the mutual exclusivity question alone or imposition of restrictions on TWA. (B14) TWA expresses

TWA urges that the Court below "misunderstood the situation" in connection with its belief that a proper hearing was required on the question of mutual exclusivity of TWA's transcontinental route award. (TWA 17) The facts, however, are to the contrary. The Court recognized that the Board had limited the hearing in the *St. Louis Case* to St. Louis-Southeast service.

The Board, it recognized, imposed the restrictions of a mandatory stop at St. Louis *as a minimum* for any possible California-Florida authorizations. (B5) This was done because the Board was unwilling to impose a through-plane restriction *in advance* as requested by its own Bureau of Air Operations (as well as Delta)[11] but retained the maximum flexibility in connection with such route awards as it might find to be necessary. In short, the Board was unwilling to assume *at the outset* of the case that the record *after* hearing would reflect that an award to TWA would have serious transcontinental implications.

The Court below held only that because the Board clearly had indicated its intention to limit the *St. Louis Case* to an area proceeding, a party need make only a

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concern lest St. Louis be deprived of needed service to the Southeast pending Board review (TWA 27). These are crocodile tears! The Board has ample statutory powers to provide, under proper circumstances, for necessary interim services pending ultimate decision. [Federal Aviation Act of 1958, § 416(b), 72 Stat. 731, 771, 49 U.S.C. 1386(b)] The necessity for such service, however, is a matter of judgment within the peculiar competency of the agency entrusted with the regulatory responsibility. TWA's suggestion would continue the present severe and irreparable injury being suffered by Delta and its interchange partners through diversion of revenues to TWA's illegal southern transcontinental operation.

[11] Consolidation Order E-10304 (J.A. 92-93).

*prima facie* showing of exclusivity to be entitled either to (1) a full hearing in some proper way on the exclusivity question or (2) protection from exclusivity by the imposition of sufficient restrictions.[12] The Court recognized that the necessary *prima facie* showing of exclusivity was made[13] and, therefore, that the action of the Board violated the rights of Delta and others. Particular note should be taken of the fact that the Court stressed that its remand was based on the lack of affording the parties an *adequate* hearing in view of the Board's refusal to make an "area" award (when the hearing was limited to area issues alone) and was *not* a substitution of its views on whether the facts of record would support a finding of exclusivity. Said the Court: "The right to a hearing is the sole question before us." (B14) The Court was clearly

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[12] In this respect nothing short of a through-plane restriction will suffice. This is a common device employed by the Board to exclude a carrier from competing in a long-haul market in which it is not certificated. For example, the Board precluded Delta from operating a single-plane service between New York and Miami via Atlanta and required an actual physical change of planes at Atlanta. A New York-Miami direct flight covers 1093 miles while a similar flight via Atlanta is 1358 miles or a circuity of 24.2%.

If a service 24.2% more circuitous than a direct service required a change of planes to avoid being competitive, how much more reason there is to require *at the minimum* a change of planes at St. Louis for TWA's operation to and from southeastern points! As was pointed out in Footnote 9, *supra*, the circuity involved in TWA's operation via St. Louis is minimal, particularly when compared to the New York-Miami 24.2% circuity over Atlanta. For example the circuity via St. Louis as compared to the interchange route ranges from a low of 1% in the Atlanta to San Francisco market to a high of 13.5% in the Tampa to Los Angeles market, or an average of only 8.1%. Also, as shown by J.A. 635-638 TWA itself believes that it has a direct competitive route so long as it is only required to make a stop at St. Louis.

[13] See Footnote 9, *supra*.

correct in stating that the Board could not evade the *Ashbacker* doctrine by making a purported finding of lack of exclusivity when exclusivity *as such* was not in issue, and the parties had been led to believe that only "area" routes were in issue.

To summarize, the Court below held that (1) in a limited "area" case, there is in issue the question only of whether other applications are *prima facie* mutually exclusive and (2) if the required *prima facie* showing is made then (a) any route award made in the proceeding must be sufficiently restricted to obviate the exclusivity problem or (b) some sort of expanded hearing on mutual exclusivity must be afforded. In the within case because Delta and others have made a strong *prima facie* showing of mutual exclusivity, further action by the Board on remand is required.

**II. "Impact of the Award to TWA on an Existing Southern Transcontinental Interchange Arrangement"**

This portion of the Court's opinion is similar to division I in that the Court concurred with Delta and American's argument that the Board did not afford an adequate hearing as to the duplication of the existing interchange services between California and Georgia/Florida. There was not, as the Court indicated, a hearing on "the public interest in a competing southern transcontinental service." (B15) Indeed, in the *Southern Transcontinental Service Case* itself, one of the hotly contested issues is whether there is sufficient traffic across the southern tier of the United States to support the services of more than one carrier!

This alternative ground for the decision of the Court below is not directly challenged in the petitions for

certiorari herein. TWA contents itself with statements that interchange service is less desirable and efficient than single-carrier service in an attempt to enlist sympathy. (TWA 9, 10) But sympathy for TWA not only is misplaced, it is no defense to the charge of lack of adequate hearing. In the *St. Louis Case* there was *no issue* of duplication or replacement of the interchanges—here again one of the specific issues of the *Southern Transcontinental Service Case* is that of termination, replacement or duplication of the interchanges.

The Court's conclusion with respect to this division of its Opinion is similar to division I. In short, the Court said that in the face of a *prima facie* showing of exclusivity with the interchanges, the Board was required either to restrict TWA's award sufficiently to preclude transcontinental implications, or afford Delta and others necessary additional proper hearing.

### III. "Eastern's Contentions Concerning Mutual Exclusivity"

The Court below considered Eastern's contentions in a separate division—and rightly so since Eastern's *Ashbacker* contentions are rather novel and not shared by others.[14] A short explanation of Eastern's *Ashbacker* argument should be helpful at this point.

Eastern argues in effect that if carrier A applies for a route segment which will duplicate any existing Eastern route segment, that Eastern is thereby entitled by the *Ashbacker* doctrine to have heard at the same time, *every* application it may wish to make for *all* routes served by carrier A which connect at the com-

[14] Eastern's *Ashbacker* contentions are, of course, colored by the fact that Eastern is attempting to protect monopoly routes from receiving necessary service from other carriers.

mon junction point. The Court below recently had occasion to discuss this theory and commented on it as follows:

> "But it is quite clear that there must be some limitation to the *Ashbacker* rule when applied to air routes. The point is well illustrated in the present proceeding. Eastern has a present route Detroit-Cleveland-Pittsburgh-Miami. Northwest has a present route Pittsburgh-Cleveland-Detroit Minneapolis-Spokane-Seattle. Northwest has filed an application for a route Pittsburgh-Tampa-Miami. It overlaps Eastern's present system and was set for hearing with Eastern's application for additional route segments within that area. Thereupon Eastern filed an application for a route Detroit-Minneapolis-Spokane-Seattle. This application overlaps Northwest's present system. Eastern says its new application is mutually exclusive with Northwest's Pittsburgh-Miami application, because the traffic, and so the competing service, to and from Miami is *through*, not merely to or from Detroit. And in a very real sense this is true. But the same thing would be true of almost any new air-route segment. An application for a segment Washington-Norfolk, by a carrier which already offered service from Washington to points all over the nation, would really involve traffic between all those points and Norfolk. But competing applicants for the Washington-Norfolk segment would not for this reason be entitled to demand comparative consideration with all applicants for certificates from Washington or Norfolk to all other points and by this maneuver translate the proceeding into an examination of the entire national air-route structure. Despite *Ashbacker* it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. Certainly the *Ashbacker* doctrine is not available for mere tactical maneuver

> purposes. An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so. We think the Board was not unreasonable in this instance."[15]

Returning to the case at hand, the Court below considered Eastern's contentions as to the TWA and Delta awards separately. As to the TWA award it again broke down the argument into two subsections—consideration in connection with (1) an area case and (2) a transcontinental award. (B16) With respect to the former, it noted that Eastern's proposed extension was wholly outside the area of the case and that the Board had full discretion to limit the area and exclude Eastern's request for St. Louis-West Coast authority. (B18)

A different situation, however, obtained with respect to Eastern's St. Louis-West application as part of a southern transcontinental route. The Court noted that on the basis of a southern transcontinental service alone Eastern would appear to be in the same position as American, Delta and National. However, since Eastern's route system to the Northeast as well as its system to the Southeast connected at St. Louis, "Eastern's proposed St. Louis-West Coast route would not be merely a southern transcontinental route but would connect to the West Coast all of Eastern's network of routes in the East." (B19) The Court reasoned that this might well be a valid basis for a determina-

[15] *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board, et al.*, D.C. Cir., 100 App. D.C. 184, 243 F. 2d. 607, 609.

tion of lack of mutual exclusivity but that the Board had not stated its conclusions adequately. The Court said specifically:

> "So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor." (B19)

The Court then commented upon a contention by the Board that Eastern had presented no evidence on the exclusivity question and noted that Eastern had referred in a petition for reconsideration to some facts upon which it relied to establish exclusivity. But, the Court said, the Board did not make the *necessary specific findings* which were required. (B20)

It is at this point that TWA seizes upon language of the Court and shouts "inconsistency". (TWA 18, 19) TWA implies that the Court said that the *full* issue of mutual exclusivity was open to Eastern. What TWA *fails* to do is to read the footnote to that part of the opinion which says in part:

> "However, the reasoning of that opinion requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route."[16]

It is perfectly clear that the mutual exclusivity issue to which the Court was referring in the body of its Opinion was the necessity of Eastern making a *prima facie* showing of exclusivity and the necessity for the Board to make adequate findings with respect thereto.

[16] Footnote 24 to Opinion below (B20).

That this is true is shown conclusively by the Court's language immediately following:

> "In sum, as to Eastern and TWA: If the Board proceeds with the *St. Louis Case* so restricted as to constitute it a true St. Louis-Southeastern points area case, it need not consolidate Eastern's application for the westward extension. But, if it proceeds with the case as in practical effect a transcontinental route case, it must make *adequate* findings upon the problem of exclusivity, which may *or may not* involve a further hearing." (emphasis added) (B20)

To paraphrase: upon remand the Board may make adequate findings which reflect that *as to Eastern* the TWA award has not been *prima facie* shown to be mutually exclusive. In such a case that ends the matter as to Eastern. If the Board's findings reflect that Eastern *did* make a *prima facie* case then further hearings may be necessary. This is completely consistent with the Court's treatment of the matter in division I of its Opinion.

The claim is also made (TWA 4, 20; EAL 23) that the Court's Opinion somehow conflicts with that of the Second Circuit in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*,[17] 271 F. 2d 752, decided October 7, 1959. That there is *no* conflict is easily demonstrated. In the within case, the Court indicated that there existed matter of record to show exclusivity while in the Second Circuit there apparently was none (C5-C6). Furthermore the parties in the Second Circuit Case were on notice of something more than a limited

[17] The Court's Opinion is set forth in full in Appendix C to the petition in No. 679. References to that opinion herein will be to that Appendix, e.g. (C7)

area case whereas in the St. Louis case the Board went to great extremes to ensure that the parties were aware that *only* a limited area case was being considered. The procedural background of the two cases is not the least comparable. Furthermore, the two cases are consistent since in the *St. Louis* case as limited, the question was one of making a *prima facie* showing of exclusivity. In the Second Circuit case Eastern clearly did not meet whatever burden was on it *in that case*. Furthermore, the opinion of the Second Circuit was filed with the Court below on October 12, 1959, and Eastern's petition for rehearing in the Second Circuit was filed with the Court below on October 26, 1959. Both were received by the Court below, both were before it when it rendered its decision, and the Court obviously saw no need to distinguish the Opinion of the Second Circuit since it was fully consistent with the decision in this case.

Turning next to Eastern's contentions on the certification of Delta between Birmingham and Memphis, the Court acknowledged Eastern's argument that certification would allow Delta to provide a through service from Kansas City to Florida points and that Eastern's Kansas City-Memphis application would have created for it *inter alia* the same service authority. The Court then noted the argument of the Board (1) that consideration of Eastern's Kansas City-Memphis application "would be an unwarranted expansion of the area case," and (2) that the mandatory multi-stop restrictions on Delta's authority were such as to obviate any exclusivity question with respect to possible route extension for Eastern between Kansas City and Memphis with the right to overfly Memphis. (B21)

The Court proceeded to comment on the question of expansion of the area in language which TWA and Eastern again claim shows inconsistency in the Court's opinion. (TWA 21-22, 24; EAL 20-22) And again these contentions are without merit! The Court pointed out that the considerations facing the Board in determining whether to include Eastern's Kansas City application were quite different, and rightly so, from the considerations in determining whether to change the *nature* of an "area" case into a transcontinental case. It then concluded that the Board had the discretion to refuse to expand the area of the case saying:

> "We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment." (B21)

But the Court below did *not* say that *Ashbacker* did not apply. On the contrary it recognized that the certification of Delta between Birmingham and Memphis was highly restricted and noted that Eastern admitted that "the Delta award would not be mutually exclusive with one part of its application" but argued only that it would preclude an identical route with the identical mandatory stops. (B21-B22) The Court pointed out that the extension of Eastern from Memphis to Kansas City would open up a host of route combinations to Eastern and that in such a situation it would be improper to compare only the one highly restricted segment. More specifically the Court said:

> "But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each pair of parts of applications. We think there is no such re-

quirement. Moreover in this contention Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, with consequent hearings thereon, filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system." (B22)

Again the Court was completely consistent. First, the route possibilities inherent in the certification of Delta between Birmingham and Memphis were so severely restricted as to obviate exclusivity problems; and, second, the route combination possibilities inherent in tying in Eastern's system at Memphis with a Memphis-Kansas City extension were such that even Eastern admitted they were not mutually exclusive.

In short, although the Board had the discretion to refuse to expand a limited area case, in the case of the transcontinental award to TWA it had acted completely *inconsistently* and in the case of the highly restricted certification of Delta between Birmingham and Memphis it had acted completely *consistently*, with its limitation of the area.

To summarize the *Ashbacker* situation, the Court below recognized that in the *St. Louis Case* the Board had established and given notice of an "area" case *limited* to the St. Louis-Southeast area. Having done so:

(1) The Board could not without further proper hearings make an effective transcontinental award if it were *prima facie* exclusive of unheard applications;

(2) Delta, American and National had made a showing of *prima facie* exclusivity both with unheard applications and with existing interchange services;

(3) The Board had the discretion to exclude Eastern's St. Louis-West Coast application from the "area" case since it would have transformed the nature of the case from an area case to a transcontinental case;

(4) Since Eastern's existing system would connect at St. Louis with its proposed route St. Louis-West, the Board might have found that Eastern had *not* made a *prima facie* showing that the extension of TWA to the southeast was mutually exclusive with the extension of Eastern from St. Louis to the West, but that the Board's findings were not sufficiently definite in this respect;

(5) The Board had the discretion to exclude Eastern's Memphis-Kansas City application since it would have expanded the area of investigation, albeit remaining an area case; and

(6) Because of the highly restricted nature of the Delta certification and the multitude of service possibilities available to Eastern from an extension to Kansas City from Memphis, no *prima facie* showing of exclusivity had been made and the Board had taken no action in this instance that was inconsistent with the area case as limited.

**IV. "The Merits of the TWA and Delta Awards Apart From Mutual-Exclusivity Arguments, and Some Miscellaneous Contentions"**

In this division the Court below disposed of the remainder of the contentions now urged by Eastern in its petition herein. In the first place, Eastern states in its petition:

> "Eastern had also urged the Court below to find that the Delta and TWA awards were not based upon proper findings of public convenience and necessity." (EAL 9)

The Court commenced division IV of its Opinion as follows:

> "Eastern contends that the TWA and Delta awards were not made upon proper findings of public convenience and necessity based on substantial evidence; * * *. While it is true that there is some evidence to support Eastern's position on certain of these issues, there is substantial evidence to uphold the challenged findings of the Board." (B22-B23)

This is a direct ruling on Eastern's contentions and the Court, as well it should, accepted the Board's "informed judgment." *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 581.

As to Eastern's recitation of the requirements for findings as stated in *United Air Lines, Inc. Red Bluff Operation*, 1 C.A.A. 778, 779-90 (1940) (EAL 13-14) these very matters were raised by Eastern in the Court below and specifically answered by Delta with respect to its certification in the Birmingham-Memphis market. In short, the Board made findings in connection with all of these matters in finding need for the services

for which Delta was certificated (J.A. 505). Furthermore, the Board in fact found that:

> "* * * we are satisfied that the authorization of such service can be provided without any undue adverse effect on the overall operations of Eastern." (J.A. 505)

Clearly, the Board *did* make the findings requested by Eastern.[18]

With respect to Eastern's final contention as to announcing tentative Board votes in a press release, this matter was dismissed by the Court below in the final two sentences of its Opinion:

> "Various other errors allegedly committed by the Board are urged upon us. We have examined these contentions and find no reversible error." (B24)

As Delta pointed out on Brief to the Court below, the Board has stated that a press release announcement is not a final decision in the following language:

> "It is evident that Eastern's attack is premised upon the assumption that the press release which we issued in this case embodied our decision in the proceeding. However, this is not the case. As a matter of fact, a press release could not legally constitute a decision since Section 1005(f) of the Civil Aeronautics Act and Section 8(b) of the Administrative Procedure Act both require that

[18] It should also be noted that Eastern's citation (EAL 14) from the Board's Opinion in the *South Central Area Local Service Case* (CAB Order E-13648, p. 62, March 21, 1959) when read in contex, reveals that the Board was concerned with a matter of increased Federal subsidy to a local service carrier. Here there is no subsidy involved and as indicated above, the Board specifically found no undue adverse effect on Eastern.

> to be effective a decision must be accompanied by findings. Our press release is no more than a public statement of the tentative vote on a given case by a majority of the Board, and the vote is no more final in a case in which a press release is issued than it is when a press release is not issued."[19]

A recent example of change from a press release announcement is found in the Board's final opinion in the *Seven States Area Case*[20] (a case of major proportions), where the Board's decision differed from its press release announcement in substantial measure—namely, (1) certificating a route segment to a different carrier than announced in the press release, (2) extending a route award to a different terminal than announced in the press release, and (3) omitting *any* certification of a route announced in the press release. That action by the Board effectively disposes of Eastern's arguments concerning prejudgment.

Eastern argues that there is a conflict of views between the Second Circuit and the Court below because the Court below did not discuss specifically the press release argument of Eastern. (EAL 30) To the contrary, it is clear that there is *no* conflict since, as indicated *supra*, the decision of the Second Circuit was filed with the Court below some two months before its own Opinion was issued. Having had the Opinion brought specifically to its attention, the Court has indicated concurrence since it obviously saw no need to comment on or distinguish the Second Circuit Opinion but merely dismissed this contention of Eastern as "no reversible error." (B24)

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[19] *New York-Florida Case*, CAB Docket No. 3051, *et al.*, Order No. E-10884, p. 16.

[20] C.A.B. Docket No. 7454, *et al.*, Order No. E-13254, dated December 8, 1958.

**Summary**

It is clear that the imagined conflicts cited by TWA and Eastern are illusory. There is, therefore, no reason for this Court to review the case below on certiorari. So long as the *Ashbacker* principle continues to be applied to air route cases under the informed and skillful guidance of the Court of Appeals for the District of Columbia Circuit without conflict from other circuits, it would be inappropriate and an undue burden for this Honorable Court to be required to review these decisions except under the most compelling circumstances. Such circumstances are clearly absent herein. Significantly the Government (acting on behalf of the Board) has not requested a writ of certiorari which it most certainly would have were the bogey men conjured up by TWA and Eastern other than illusory. As demonstrated above, the opinion of the Court below is clear and consistent.

**CONCLUSION**

For the foregoing reasons Delta submits that the Petitions of TWA and Eastern for a writ of certiorari should be denied forthwith.

Respectfully submitted,

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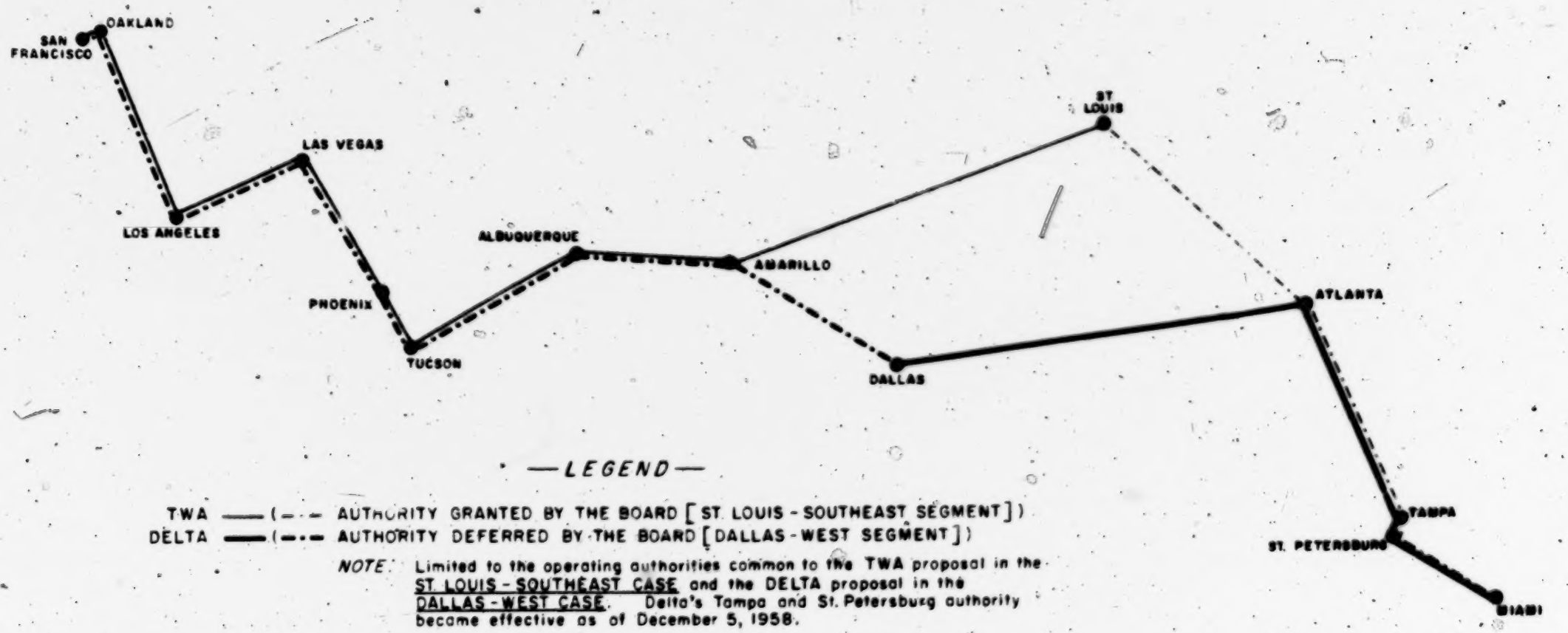
April 8, 1960

APPENDIX A

## SCHEMATIC REPRESENTATION (GEOGRAPHICALLY ACCURATE) OF THE SOUTHERN TRANSCONTINENTAL SERVICES COMMON TO THE DEFERRED DELTA PROPOSAL AND THE GRANTED TWA PROPOSAL




—LEGEND—

TWA ——(— · — AUTHORITY GRANTED BY THE BOARD [ST. LOUIS - SOUTHEAST SEGMENT])
DELTA ——(—·— AUTHORITY DEFERRED BY THE BOARD [DALLAS - WEST SEGMENT])

*NOTE:* Limited to the operating authorities common to the TWA proposal in the ST. LOUIS - SOUTHEAST CASE and the DELTA proposal in the DALLAS - WEST CASE. Delta's Tampa and St. Petersburg authority became effective as of December 5, 1958.

# DELTA ROUTE MAP SHOWING AWARD TO DELTA IN THE ST. LOUIS - SOUTHEAST SERVICE CASE